No. 82-1824

In The

Supreme Court of The United States

October Term, 1982

ROBERT A. HIRSCHFELD, and
WILLIAM D. HIRSCHFELD,
Petitioners,
v.
RAYMOND F. DREYER,
ROBERT K. CLUNIE, and
NADINE M. CLUNIE,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF STATUTES

TABLE OF OTHER REFERENCES

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CORRECTIONS TO RESPONDENT'S STATEMENT OF THE CASE

The Question Presented on Certiorari is a matter of Law. Nevertheless, Respondent's factual misrepresentations should not stand uncorrected.

The April 8, 1977 California visitation order was not "obliterated" by the brief vacation lawfully enjoyed by Petitioner and his two children in his custody; rather, it was expressly voided by a stipulated agreement in early June,

1977, said stipulation becoming order of the California court on June 24, 1977.

Respondents mischaracterize Serisa's June 9, 1980 *escape* from Arizona authorities, and Respondent's thwarting of the renewed police search for the child by Respondent's admitted removal of Serisa from Arizona to California as "...she left to return to her mother in California."

Respondents gloss over the crucial events between Serisa's June 9, 1980 escape from the Arizona facility, and Respondent's seeking of an exculpatory custody modification on June 24, 1980 in California. These events, which are alleged specifically among the other allegations of the Amended Complaint (Respondent's Opposition Appendix A), independently comprise the solid jurisdictional foundation for the federal diversity tort action herein:

☐ *Petitioner Robert Hirschfeld had settled, uncontested sole custody of Serisa at all times until the June 24, 1980 ex parte order.*

☐ *Respondents wilfully took, enticed or kept Serisa from her father's care, custody and control, by transporting Serisa from Arizona to California, without Petitioner's knowledge or consent, and concealing her whereabouts before they obtained the June 24, 1980 ex parte order.*

☐ *All persons, including non-custodial ex-spouses, have a common-law duty not to engage in such custodial interference, which additionally, is a felony,* A.R.S. §13-1302, *in Arizona.*

☐ *Volition or active participation of the child is not a defense in either custodial interference tort or felony action. The victim is deemed to be the parent who is unlawfully deprived of the child.*

☐ *Diversity subject-matter jurisdiction of the federal court attached by virtue of the tort commission between June 9 and 24, 1980, and does not abate merely because Respondents thereafter sought to embroil the California state court in a self-serving, exculpatory domestic relations custody modification.*

Serisa's attainment of her majority on March 19, 1982 did indeed render injunctive relief moot. In their 23 page Opposition Appendix, Respondents are apparently attempting

to unduly impress the Court with the percentage of Amended Complaint verbiage necessarily devoted to setting forth the factual background of the complaint, and praying for now-moot injunctive relief. The prayer for $3,000,000 in compensatory and exemplary damages at Law can hardly be termed insubstantial. Petitioner's Ninth Circuit oral argument on September 9, 1982, focused solely upon said monetary damages. Respondent's Opposition allegation that such focus arose only on Petition for Certiorari is false.

1.
THE *DE FACTO* DOMESTIC RELATIONS POLICY OF THE NINTH CIRCUIT CREATES INTERCIRCUIT CONFLICT WHETHER PUBLISHED OR NOT

The *de facto* Ninth Circuit domestic relations policy is published in *Csibi v. Fustos*, 670 F.2d 134 (9th Cir. 1982) and *Buechold v. Ortiz*, 401 F.2d 371 (9th Cir. 1968), neither of which deal with the torts of parental kidnapping, custodial interference, or intentional infliction of severe emotional distress.

The policy's application to the instant case is known by word of mouth among judges and lawyers, and is cited in the American Bar Association book, Hoff, Schulman, Volenik and O'Daniel, *Interstate Child Custody Disputes and Parental Kidnapping: Policy, Practice and Law*, Lib.Cong.Cat. Card No. 82-83415, ISBN 0-89707-084-4 at page 3-44. The instant Petition for Certiorari, including the gravamen of the Ninth Circuit's policy, is nationally reported at 9 FLR 2547 and 51 LW 3296. Existence and gravamen of the then-pending Ninth Circuit appeal herein was disclosed and discussed from the podium at the September 9-11, 1982 *First National Conference on Interstate Child Custody and Parental Kidnapping Cases*, Washington, D.C., sponsored by the Child Custody Project and Family Law Section, American Bar Association.

Word-of-mouth knowledge of the instant case has caused at least one other federal diversity parental kidnapping tort complaint, originally filed in the Arizona District Court, to be witheld from service while it is refiled in a District Court within the Fifth Circuit, whose published *Fenslage v. Dawkins*, 629

F.2d 107 (5th Cir. 1980) indicates probable acceptance of subject matter jurisdiction there.

Each Appellate Judge of the Ninth Circuit was given an opportunity, by Petitioner's Suggestion of Rehearing in Banc, to request a vote regarding rehearing of the instant case. All declined (Appendix, A3, to Petition for Certiorari), indicating a tacit Circuit-wide knowledge and approval of the *de facto* policy.

The dangers and pitfalls of judicial suppression of opinion publication are treated in Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A.J. 1224 (1975); Reynolds and Richman, *The Non-Precedential Precedent- Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L.Rev. 1167 (1978); Note: *Unreported Decisions in the United States Courts of Appeals*, 63 Cornell L.Rev. 128 (1977).

The Ninth Circuit's *sub silentio* policy is unfair to future litigants, undoubtedly encouraged by successful published federal diversity parental kidnapping tort actions in other Circuits, who may file doomed complaints within the Ninth Circuit. Non-publication thus may fail of its essential purpose, judicial economy, by engendering many wasteful, aborted federal court actions in the Ninth Circuit.

Precedential conflicts of the Ninth Circuit's published *Csibi* and *Buechold*, Supra, cases were not presented to the Supreme Court for resolution. It is not the instant case's precedential value but its timeliness and clear statement of the *de facto* conflict which recommends Certiorari to enable the Supreme Court to address an issue no less real by virtue of non-publication. The Court should not permit a Circuit to knowingly perpetuate such a conflict by the Circuit's refusal to publish cases wherein the conflict might become more evident.

2.
RESPONDENT'S ALLEGED FACTUAL DISTINCTIONS ARE IRRELEVANT TO THE INTERCIRCUIT CONFLICT

Respondents, for the first time attempt in their Opposition to characterize the cited cases with which the Ninth Circuit conflicts, as involving "forcible removals or abductions,"

conjuring up visions of unwilling children being dragged away, kicking and screaming, by one of their own parents. Of course, this is rarely the case.

Children whose unified family has been split by divorce almost universally regard their transportation or retention by a non-custodial parent, with or without consent of the lawful custodian, as at least a temporary "visitation." The common law of torts and the various state criminal sanctions for such unilateral "removals or abductions" focus upon damage done to the victimized lawful custodian, regardless of the child's volition or cooperation in the tortious or criminal act.[1,2]

Respondents have presented no foundation for their allegation that the children in the cited *Lloyd, Acord, Kajtazi, Fenslage, Wasserman* or *Bennett* cases were more or less cooperative with the unlawfully "abducting or removing" non-custodial parent than was Petitioner's daughter herein. Indeed, in *Lloyd* and *Kajtazi*, the role played by the child may never be known, as the children in those cases remain missing.

The cited cases share not only a striking factual similarity with the instant matter, more importantly, they share a common legal issue: in each, a federal court was faced with a decision as to whether exercise of federal diversity jurisdiction

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n.1. "One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has left him, is subject to liability to the parent." **Restatement II of Torts,** 33 §700, **Causing Minor Child to Leave or Not to Return Home.**

n.2. A.R.S. §13-1302, **Arizona Revised Statutes: Custodial Interference; classification-**

A. A person commits custodial interference if, knowing or having reason to know that he has no legal right to do so, such person knowingly takes, entices or keeps from lawful custody any child less than eighteen years of age or incompetent, entrusted by authority of law to the custody of another person or institution.

B. Custodial interference is a class 6 felony unless the person taken from lawful custody is returned voluntarily by the defendant without physical injury prior to arrest, in which case it is a class 1 misdemeanor.

might interfere with the state's historic pre-emption in *establishing or modifying familial relationships.*

Outside the Ninth Circuit, modern federal court decisions have held that federal jurisdiction could be exercised over tortious breach of duties *which were not unique to spousal or parent-child relationships*, and narrowly construed the exclusive domain of state courts to lie in *creation or modification* of such relationships.

The conflicting Ninth Circuit view overbroadly proscribes mere *federal reliance* upon the *res judicata* of a long-settled, state created or state modified family relationship, as an underlying status requisite at the time a tortious act is committed. It is this question of Law, not fact, which forms the Question Presented on Certiorari.

3.
MOOTNESS OF ONE POTENTIAL REMEDY DOES NOT PRECLUDE STILL-VIABLE RELIEF

The Federal Rules of Civil Procedure permit complaints to be pled in the alternative. F.R.C.P. 8(a) Petitioner originally sought both injunctive and monetary relief. Now that the injunctive prayers have become moot through Serisa Hirschfeld's attainment of majority, Respondents appear to argue that the still viable prayer for substantial tort damages does not merit further consideration. To the contrary: troublesome issues involved solely with the injunctive relief need no longer cloud a clear consideration of the inter-circuit conflict revolving around the damage claims.

Respectfully submitted,
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